No. 98-1181

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MARY HITCHCOCK MEMORIAL HOSPITAL, *et al.*,
Petitioners,

v.

RICHARD F. KLONOSKI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS [1]

The First Circuit's decision improperly expanded the supervisory role of the Court of Appeals in two fundamental respects. First, in second-guessing the District Court's factual findings on a discovery issue and finding "misconduct" where none was found below, the Court of Appeals encroached on the trial court's broad discretion to manage its proceedings. Second, in ignoring the settled presumption that juries follow their instructions and remanding for a new trial, the Court of Appeals usurped the decisionmaking function of the jury panel. Both aspects of the First Circuit's decision conflict with decisions of its sister circuits and of this Court, and present the important question of the proper limits on appellate courts' supervisory authority over the trial process.

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[1] Petitioners' Rule 29.6 Statement appears at Pet. ii.

Respondent's brief in opposition does not come to terms with petitioners' arguments in the least. While conceding (as he must) that the purported legal basis for the Court of Appeals' discovery ruling—that the district court erred in admitting the letters for impeachment purposes—was an utter fiction, *see* Opp. 6 n.1, *id.* 10 n.4, respondent insists that the Court of Appeals nonetheless ruled "as a matter of law" when it substituted its own factual findings for the District Court's and reversed a discovery ruling based on those new findings. Respondent's verbatim recital of the Court of Appeals' extensive findings of fact gives the lie to that argument. *See* Opp. 8, 9, 13, 15; *id.* 12 (referring to "Court of Appeals' express *findings* of prejudice") (emphasis added).

Respondent likewise has no answer to petitioners' argument that in remanding the case for a new trial, the Court of Appeals created a brand new exemption for "misconduct" cases from the well-established presumption that juries follow their instructions. He argues only that the Court of Appeals "chose" not to follow the presumption in this case. Opp. 16. Respondent's arguments should be rejected and the petition granted to resolve the important question presented.

1. A party failing to disclose information required under the discovery rules is precluded from using that information at trial, unless its failure to disclose is harmless *or* the party shows "substantial justification" for its failure to disclose. Fed. R. Civ. P. 37(c)(1).[2] The District

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[2] This Court will search in vain for an acknowledgment of Rule 37's "substantial justification" safe harbor in the opinion of the First Circuit, because the Court of Appeals ignored it. It stated that Rule 37(c)(1) was "*mandatory*: a party that fails to make the required disclosures 'shall not, *unless such failure is harmless*, be permitted to use [undisclosed] evidence at a trial.'" App. 29a (quoting Rule 37(c)(1)) (emphasis added, alteration in opinion). Respondent adopts the Court of Appeals' misapprehension of the law. Opp. 5 ("The Court noted that imposition of a sanction is *mandatory unless the failure to disclose is harmless*") (emphasis added); *id.* 11 (suggesting that Rule 37(c)(1) "*requires* a sanction for failure to disclose") (emphasis added).

Court concluded that the latter exception applied in this case. Crediting the representation of defense counsel that Jolanta Klonoski's letters to her sister could not have been obtained or disclosed any earlier than they were, *see* App. 68a, the District Court made a factual finding that the defendants could not have "delivered [the letters] to the plaintiffs in a meaningful timely way," *id.* 73a, and ruled that it would admit limited excerpts of the letters. That ruling was entitled to abuse-of-discretion review. *See Pierce* v. *Underwood,* 487 U.S. 552, 558 n.1 (1988); *Williams* v. *Monarch Mach. Tool Co.,* 26 F.3d 228, 230 (1st Cir. 1994). The factual finding upon which the ruling rested—that defendants could not have obtained and disclosed the letters any sooner than they did—was entitled to review only for clear error. Fed. R. Civ. P. 52(a); *Cooter & Gell* v. *Hartmarx Corp.,* 496 U.S. 384, 404 (1990).

Neither respondent nor the Court of Appeals even acknowledges the relevance of Rule 52(a). In a complete rejection of its obligations under Rule 52(a), the Court of Appeals threw out the District Court's factual findings, repeatedly stating that defendants had committed "egregious" violations of the discovery rules and the District Court's own discovery orders, and concluding that the defendants had committed "discovery misconduct." *See, e.g.,* App. 43a ("there was, intentional or otherwise, an egregious breach of the discovery orders and the discovery rules"); *id.* 41a-43a (concluding that defendants had committed "discovery misconduct"). This was factfinding, pure and simple.

The Court of Appeals attempted to camouflage its overt factfinding by stating that the District Court had actually erred as a "matter of law," because it had admitted the letter evidence under an exception to the discovery rules allowing nondisclosure of evidence used for impeachment purposes. *See* Fed. R. Civ. P. 26(a)(3). Respondent concedes that this "legal ruling" was a fiction: the District Court did *not* admit the evidence solely for impeachment

purposes, and the "error of law" concocted by the Court of Appeals has no basis in the record. *See* Opp. 6 n.1 (acknowledging that District Court allowed letters into evidence as admissions of a party-opponent); *id.* 11 n.6 (acknowledging that District Court's ruling was "not ultimately limited to impeachment").

His concession aside, respondent's defense of the Court of Appeals' discovery ruling consists of a citation to a single case, *Hickman* v. *Taylor*, 329 U.S. 495 (1947), and lengthy excerpts from the Court of Appeals' decision. Respondent suggests that the Court of Appeals actually "ruled as a matter of law" in reversing the District Court's discovery ruling, apparently because the Court of Appeals stated that a party's failure to obtain documents prior to the deadline " 'does not excuse a violation.' " Opp. 8 (quoting App. 36a); *see also* Opp. 12 ("the Court of Appeals held as a matter of law, that the defendants violated the discovery rules and orders"). But under Rule 37(c)(1), a "violation" *is* excused if a party's failure to disclose is found to have been substantially justified. The District Court reached just that conclusion after making a credibility assessment of defense counsel's representations and finding that the letter evidence could not have been obtained or produced any sooner than it was. The Court of Appeals rejected that factfinding outright and replaced it with its own. Respondent simply has missed the point.

Nor does respondent answer petitioners' related argument that by rejecting the District Court's express holding that defendants had not violated its July 1996 discovery order, *see* App. 36a n.9, the Court of Appeals departed from the settled principle that reviewing courts must give "particular deference to the district court's interpretation of its own order." *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 498 (3d Cir. 1982). The district judge in this case expressly concluded that defendants had not violated his discovery order. App. 73a. The Court of Appeals ignored that finding and concluded that defendants had in

fact committed an "egregious breach" of the order. App. 41a; see id. 43a. Respondent's brief does not even address this argument.

2. The Court of Appeals concluded that defendants' "discovery misconduct" warranted a new trial, although the District Court had issued a firm (and unchallenged) limiting instruction that the letter evidence went *only* to damages, and the jury returned a verdict of no liability. To avoid the "almost invariable" presumption that juries follow their limiting instructions, *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987), the Court of Appeals created a novel distinction between instances of "misconduct" and other occurrences giving rise to corrective instructions. As petitioners pointed out in their opening brief, this distinction conflicts with cases from this Court and other circuits squarely holding that a corrective instruction remedying "misconduct," as with all other corrective instructions, triggers the presumption that juries adhered to that instruction. *See* Pet. 23-25; *Greer* v. *Miller*, 483 U.S. 756, 766 (1987) (corrective instruction following prosecutorial misconduct sufficient to cure any prejudice); *Mason* v. *Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1456 (10th Cir. 1997) (discovery misconduct occurring during course of trial adequately cured with instruction).

Respondent has no answer. He states only that the Court of Appeals "chose to apply the rule of law governing allocation of the burden of discovery misconduct, rather than the presumption that juries follow the instructions given." Opp. 16. This is indeed what the Court of Appeals did, and the Court of Appeals was wrong.

Like the Court of Appeals, respondent relies heavily on *Anderson* v. *Cryovac*, 862 F.2d 910 (1st Cir. 1988), to support his argument that defendants' "discovery misconduct" warranted a new trial despite the District Court's firm instruction limiting consideration of the letters to the damages issue and the jury's subsequent verdict of no liability. But also like the Court of Appeals, respondent fails to acknowledge that the defendants in *Anderson*

wrongfully withheld evidence damaging to their case until *after* the jury had returned a defense verdict and the plaintiffs had appealed. *See* 862 F.2d at 922. The trial court in *Anderson* therefore had no opportunity to cure the misconduct in that case with a jury instruction, and the strong presumption that juries follow their instructions was never triggered.

The two other cases respondent cites are also beside the point. In *Peacock Records, Inc.* v. *Checker Records, Inc.*, 365 F.2d 145 (7th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967), defendants moved for a new trial following a bench trial resulting in a verdict for the plaintiffs, and attached affidavits from several of the plaintiffs stating that they had committed perjury at trial. The district court refused to entertain the motion. The court of appeals reversed, concluding that affirming the district court would allow the remaining plaintiffs to "avoid a specific, direct judicial inquiry and determination as to the truth of the sworn statements." 365 F.2d at 147.

In *Wilson* v. *Thompson*, 638 F.2d 801, 802 (5th Cir. Unit B 1981), appellants discovered new evidence "several weeks after the district court's denial of an injunction and the filing of an appeal." The newly discovered evidence—a tape-recorded conversation between counsel and a witness—was found to be cumulative by the district court, and the court of appeals affirmed the trial court's decision. *Id.* at 804.

How these two cases further respondent's argument is a mystery. No limiting instruction was given in *Peacock Records*, because the case was tried to the bench and decided *prior* to the revelation that some plaintiffs had perjured themselves at trial. No limiting instruction was given in *Wilson*, because the case was, again, tried to the bench, and again, decided *prior* to the revelation of the new evidence. As with *Anderson*, the withholding of relevant information until after trial denied both trial courts the opportunity to correct the wrongdoing with a limiting instruction. Here, what the Court of Appeals deigned

defendants' "discovery misconduct" occurred during the course of trial and was addressed by a firm limiting instruction, triggering the nearly insurmountable presumption that the jury would follow its instructions.[3]

Respondent argues in the alternative that the "almost invariable" presumption that juries follow their instructions was properly overborne in this case, because the Court of Appeals "made the findings" necessary to support that conclusion. Opp. 15; *see also id.* at 16 (Court of Appeals "made more than adequate findings" to override presumption). This argument returns once more to the first fundamental error committed by the Court of Appeals. Setting aside the fact that the Court of Appeals never even acknowledged the presumption, much less determined that it was trumped, the "findings" to which respondents refer all rest on the Court of Appeals' conclusion, based on its independent factfinding, that defendants had committed "discovery misconduct." That conclusion improperly controverted the District Court's findings that defendants could not have discovered and did not discover the evidence any sooner than they did, and that admitting limited excerpts of the evidence was substantially justified under the circumstances.

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[3] Further, each of the cases relied on by respondent involved misconduct affecting evidence relevant to an issue that was decided by the factfinder during trial. In contrast, the letters at issue in this case were relevant only to damages, a question that was never reached by the jury.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the petition should be granted.

Respectfully submitted,

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